

2010 WL 7588993 (Minn.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Minnesota.
Third Judicial District
Freeborn County

Beverly BUTTS, by and through her Power of Attorney, Kathy Iverson; Kenneth Hojberg, by and through his Power of Attorney, Leeann Hojberg; Clare Knutson, by and through his Power of Attorney, Paul Knutson; and Sylvia Wulff, by and through her Power of Attorney, Morris Blom, Plaintiffs,

v.

THE EVANGELICAL LUTHERAN GOOD SAMARITAN SOCIETY, Individually and d/b/a Good Samaritan Society-Albert Lea, Brianna Broitzman, Ashton Larson, Alicia Heilmann, and Kaylee Nash, Defendants.

No. 24CV10129.
October 18, 2010.

Plaintiffs' Memorandum in Support of Voluntary Dismissal Without Prejudice

[James P. Carey](#) #180555, [Marcia K. Miller](#), # 032162X, Attorneys for Plaintiffs, Sleben, Grose, Von Holtum & Carey, Ltd, 900 Midwest Plaza East, 800 Marquette Ave, Minneapolis, Minnesota 55402, (612) 333-4500.

[Mark R. Kosieradzki](#), #57745, [Joel E. Smith](#), #213184, Attorneys for Plaintiffs, Kosleradzki Smith Law Firm, LLC, 3675 Plymouth Blvd., Suite 105, (763) 746-7800.

Judge: The Hon. [Steven Schwab](#).

INTRODUCTION

This case arises out of the **abuse**, mistreatment, and neglect of **elderly**, vulnerable Plaintiffs while they were residents at Defendant nursing home, Good Samaritan Society—Albert Lea. Sadly, Kenneth Hojberg passed away before he was able to seek redress for the **abuse** he suffered. This Court can not adjudicate Mr. Hojberg's claims on the merits because Defendants' motions come to this Court on the pleadings alone. Therefore, dismissal is properly before this Court as a motion for voluntary dismissal without prejudice.

In addition, in identical matters involving Co-Plaintiffs Beverly Butts and Sylvia Wulff, this Court already determined that Defendants would suffer “minimal prejudice” and therefore granted Plaintiffs' previous motions for voluntary dismissal without prejudice. Just as with the previous motions, here this Court should grant Plaintiffs' Motion for Voluntary Dismissal without Prejudice.

FACTUAL BACKGROUND

In January of 2010, the above-named plaintiffs filed a civil suit against Defendants based on Defendants' ongoing, **abusive**, and neglectful conduct against Plaintiffs. (Comp. ¶¶ 14-15.) Defendants are Good Samaritan Society and their employees at their Albert Lea nursing home. Good Samaritan Society has its base of operations, its corporate office, and its main administrative offices in South Dakota.

Plaintiffs have had very limited opportunities to conduct discovery. Further two of the **elderly** plaintiffs passed away prior to Mr. Hojberg's passing on October 10, 2010. Beverly Butts passed away on May 15, 2010 and Sylvia Wulff, passed away

on August 16, 2010. Defense counsel brought motions for partial summary judgment in both the Butts and Wulff matters. In both matters, this Court granted Plaintiffs' motion for voluntary dismissal without prejudice and denied Defendants' motion for partial summary judgment. (Aug. 24, 2010 Order "Butts Ord." at 2, 7-8; Oct. 5, 2010 Order "Wulff Ord." at 1.) This Court noted the following in the Wulff matter:

The only difference between the current cross motions before the Court and the previous cross motions for voluntary dismissal and summary judgment is the fact that we are dealing with the death of a different named Plaintiff and three additional months have passed. No additional discovery was completed. There is no new or additional prejudice that will result in harm to Defendants by the Court granting Plaintiffs' motion.

(Wulff Ord. at 4-5.) The same is true here. No additional discovery has been completed and no new or additional prejudice has arisen that will result in harm to Defendants.

ANALYSIS

Voluntary dismissal without prejudice is warranted here. The district court has wide discretion in determining whether to grant plaintiffs' motion for dismissal. *Willard v. Max A. Kohlen, Inc.*, 202 Minn. 626, 628, 279 N.W. 553, 554 (1938). A request to voluntarily dismiss a case is governed by Minn. R. Civ. P. 41.01(b), which provides, "[A]n action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper."

Voluntary dismissal is granted when "prejudice to opponents is likely to be minimal." *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. 1998). To determine if voluntary dismissal is proper, courts look at whether defendants will be deprived of their existing defenses or would suffer other legal prejudice. *Id.*

In addition, voluntary dismissal is generally granted without prejudice. See *Peters v. Waters Instruments, Inc.*, 312 Minn. 152, 156, 251 N.W.2d 114, 116 (Minn. 1977) (stating dismissal with prejudice is a drastic form of relief). The Minnesota Supreme Court has stated that dismissal with prejudice should be granted only in exceptional circumstances where there are "considerations of willfulness and contempt for the authority of the court or the litigation process, in addition to prejudice to the parties involved." *Id.*

Courts deny a motion for voluntary dismissal without prejudice only where litigation is significantly underway, where a defendant would be stripped of a defense that would otherwise be available to him, and where a plaintiff can offer no explanation for the requested dismissal. See e.g. *Altimus*, 578 N.W.2d at 412 (affirming denial of dismissal where request for denial was made two years after lawsuit was initiated and defendants would be denied an existing defense).

Here, unlike in *Altimus*, very limited discovery has been conducted and litigation is barely underway. Here, there will be no prejudice to Defendants if Kenneth Hojberg's claims are dismissed; and the dismissal in no way deprives Defendants of any defenses that are otherwise available to them.

Further, this Court has applied the *Altimus* factors to two other identical motions in this case and has concluded that there would be minimal prejudice to Defendants if the claims of the deceased plaintiffs were voluntarily dismissed. (Butts Ord. at 6-8; Wulff Ord. at 4-5.) No additional discovery has been completed in this case since this Court's August 24, 2010 Order in the Butts case and the October 5, 2010 Order in the Wulff case. Therefore, this Court should grant Plaintiff's Motion for Voluntary Dismissal without Prejudice as it did in the Butts and Wulff cases.

CONCLUSION.

Based on the foregoing Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Voluntary Dismissal.

Date: 10/18/10

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